Supreme Court, U.S.
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No. 00-1072

In The

Supreme Court of the United States

LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether, under the circumstances of this case, EEOC regulation 29 C.F.R. §1601.12(b) permits petitioner to convert a timely letter requesting to file a discrimination complaint into a properly sworn charge after the statutory limitations period has expired.

II. Whether equitable tolling is appropriate in the circumstances of this case.[1]

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[1] The respondent has restated the first question in order to clarify that the Fourth Circuit did not declare 29 C.F.R. §1601.12(b) invalid, as suggested by the petitioner. The court ruled that the regulation could not be applied so as to add verification to a charge after the statutory limitations period had expired, thus producing a timely, sworn charge (Petition at 7a). The respondent has restated the second question because, as originally stated, it implied that the petitioner relied on the regulation in failing to file a sworn charge in a timely manner. There is no such indication in the record (see discussion *infra*).

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Respondent Lynchburg College respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Petitioner Leonard Edelman, seeking review of the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Supreme Court Rules 15 and 24 permit the respondent to omit certain sections of its brief that would otherwise be required, so long as the respondent is satisfied with the opposing party's presentation of the material in those sections. The respondent has no objection to the petitioner's presentation of the list of parties, citations to the opinions below, basis for jurisdiction, or recitation of the statutes and regulations, and does not repeat those here. However, the respondent objects to the questions presented and the statement of the case as put forth by the petitioner, and therefore restates those sections in its response.

STATEMENT OF THE CASE

This case involves an EEOC regulation that purportedly permits a complainant to convert a timely filed but unsworn letter requesting to file a charge into a properly sworn charge of discrimination after the limitations period has run. Even if this procedure is authorized by Title VII, as petitioner Edelman argues, the regulation is inapposite in this case, where neither Edelman nor the EEOC treated Edelman's unsworn letter as a charge of discrimination. The facts pertaining to petitioner's claims and his EEOC filings are further set forth below.

Lynchburg College ("the College") hired Leonard Edelman as an Assistant Professor of Biology in August 1993. Three years later, in the fall of 1996, Edelman filed an application for tenure— the award of a lifetime employment contract at the College. As required by College procedures,

his application was considered independently by his teaching colleagues, the College administration, and ultimately the College's Board of Trustees. While supported by his faculty colleagues, his application was not supported by the administration and was rejected by the Board of Trustees on May 23, 1997. Although this decision was sent to Edelman by campus mail on the same day it was made, Edelman claims that he did not receive notice of the tenure decision until June 6, 1997. Accordingly, the 300-day statutory limitations period for filing EEOC charges has been determined based on that later date.

As a preliminary step in making a complaint of discrimination, Edelman sent a letter to the EEOC on November 14, 1997, in which he claimed discrimination on the basis of gender, "exacerbated by discrimination on the basis of my family's national origin and religion." By its own terms, the unsworn letter was "a request to file a charge of employment discrimination." Edelman concluded his letter by stating that the EEOC would shortly be hearing from his two attorneys concerning his complaint.

The EEOC did not assign a charge number to Edelman's letter or send a copy of it to Lynchburg College. In fact, Edelman's own attorney asked the EEOC not to send Edelman's "charging documents" to the College until Edelman had an interview with an EEOC investigator. The EEOC complied with Edelman's request, and did not send the letter to the College.[2]

The EEOC responded to Edelman's letter on December 3, 1997. In that response, the EEOC stated that it

[2] Indeed, the EEOC never sent Edelman's letter to the College during the course of processing Edelman's complaint. The letter was made available to the College, along with the remainder of Edelman's EEOC file, only after the EEOC had closed its file on the case.

needed additional information in order to investigate Edelman's case. The EEOC further admonished Edelman that if he did not contact the EEOC to schedule an interview, the agency would assume that he "did not intend to file a charge of discrimination." The EEOC urged Edelman to schedule his interview as soon as possible, "because a charge of discrimination must be filed within the time limits imposed by law."

The EEOC interviewed Edelman by telephone on March 3, 1998. He decided not to pursue his claims of discrimination based on religion and national origin.[3] On March 18, 1998, the EEOC sent Edelman a formal charge form ("EEOC Form 5") containing a charge based on the information provided by Edelman during his interview as well as a section for a verified signature. The charge alleged gender discrimination only and did not in any way refer to Edelman's earlier letter or to its different allegations of religious and national origin discrimination. Although the EEOC had sent the Form 5 charge to Edelman with over two weeks remaining before expiration of the 300-day statutory period, Edelman did not file the verified charge with the EEOC until April 15, 1998, 313 days after the date of alleged discrimination.

The EEOC did not assign a number to Edelman's case until after it received his verified charge on EEOC Form 5. Approximately one week later, the EEOC sent a copy of the charge to both Lynchburg College and the Virginia Council on Human Rights, the Virginia agency authorized to seek relief from unlawful employment practices. After completing its investigation, the EEOC issued Edelman a right to sue letter on March 26, 1999.

[3] The intake notes from Edelman's interview with the EEOC on March 3, 1998, state "religious and national origin discrimination discounted. Do not include as a basis" (JA 115).

Edelman initially chose to pursue his grievance against the College in state court, alleging state law claims of wrongful termination, breach of contract, and intentional infliction of emotional distress. The College removed the action to federal court after Edelman amended his complaint to assert a cause of action under Title VII, 42 U.S.C. §§2000e through 2000e-17. In the amended complaint, he sought to resurrect his claims of discrimination on the basis of national origin and religion, even though those claims were nowhere mentioned in his verified charge before the EEOC. The College moved to dismiss, and the district court granted the motion on the basis that Edelman had failed to timely file his charge of discrimination. The district court's ruling was affirmed by the Fourth Circuit Court of Appeals, and Edelman filed a petition for certiorari.

REASONS FOR DENYING THE WRIT

I. This Case Is Not Appropriate For Certiorari Because Its Disposition Does Not Depend On The Validity Of 29 C.F.R. §1601.12(b).

In asking the Court to grant certiorari, the petitioner argues that the split among the circuits on the issue of verifying a charge after the limitations period has expired justifies a grant of certiorari in this case. The respondent disagrees on several grounds.

A. There Is No Need To Reach The Issue Of The EEOC Regulation's Validity In This Case.

On the facts in Edelman's case, the Fourth Circuit did not have to reach the issue whether 29 C.F.R. §1601.12(b) can properly be used to verify a charge after the limitations period for filing has expired. The Court had the option, taken by both the district court and Judge Luttig in his

concurring opinion in the Fourth Circuit, of ruling on a narrower ground—namely, that Edelman's unsworn letter did not constitute a "charge" that could be amended under the regulation.

As explained above, 1) Edelman characterized his letter as a "request to file a charge"; 2) the EEOC did not treat the letter as a charge, either when it was filed or subsequently; 3) the EEOC did not serve a copy of the letter on Lynchburg College or send a copy of it to the state deferral agency; 4) the sworn charge did not refer to the earlier letter; and 5) the charge alleged different discriminatory conduct than did the unsworn letter. These factors provided ample grounds for a ruling that the validity *vel non* of 29 C.F.R. §1601.12(b) need not and should not be reached, since in this case there was no "charge" to amend. While the Fourth Circuit majority reached out unnecessarily to consider the "relation-back" provision of the regulation as it applies to the requirement of verification, that is not a reason for this Court to do the same.[4]

B. The "Split" In Circuits On The Validity Of The EEOC's Regulation Does Not Compel A Grant Of Certiorari In This Case.

The "split" in circuits on the validity of the relation-back regulation and its effect on EEOC claimants is not

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[4] In the Fourth Circuit's majority opinion, Judge Beezer stated that "[t]he parties agree that if the regulation is applied to Edelman's discrimination charge, the sworn-but-untimely charge relates back to his unsworn-but-timely letter and is thus timely filed. The parties, disagree, however, as to whether the regulation may be so applied" (Petition at 4a). The respondent wishes to clarify that it has never agreed that Edelman's unsworn letter constituted a "charge" to which the regulation could be applied. The respondent argued its case on the grounds adopted by the district court, and mentioned a challenge to the validity of the regulation only as a secondary, and unnecessary, ground of decision.

nearly so pronounced as the petitioner implies. In fact, the clear-cut facts of this case would have produced the same outcome in the two circuits that have most recently approved the use of 29 C.F.R. §1601.12(b) to verify a charge after the limitations period had expired.

In the Seventh and Tenth Circuits, the validity of the regulation has been upheld, but those courts do not apply the regulation automatically. Instead, they evaluate the facts of the case to determine how the unverified complaint was treated by the EEOC and also to determine whether the employer was prejudiced by the belated verification. For example, in *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F.2d 321 (7th Cir. 1991), the court held that on the facts of that case, the EEOC's intake questionnaire qualified as a charge and could therefore be verified after the statutory period had run. In so holding, the court considered whether the EEOC had treated the questionnaire as a charge. The court noted that the EEOC had assigned a charge number to the questionnaire and had also notified the claimant's employer of the charge within the 300-day limitations period. In other words, the EEOC treated the questionnaire as a charge, and complied with the statutory requirement to send a copy of a charge to the employer. In contrast, the EEOC's handling of Edelman's unsworn letter indicates that it did not regard the letter as a charge. In fact, the EEOC's refusal to send the College a copy of the letter—and Edelman's request that the agency refrain from doing so—indicates that neither of them regarded the letter as a charge. Further, Edelman's sworn charge did not relate back to the letter because it alleged different discriminatory conduct. On these facts, even the Seventh Circuit would refuse to allow belated compliance with the verification requirement (*see* Petition at 10a).

Similarly, in *Peterson v. City of Wichita*, 888 F.2d 1307, 1309 (10th Cir. 1989), *cert. den.* 494 U.S. 932, 109 L.Ed.2d 502 (1990), the EEOC had assigned a charge number to the unverified complaint. The court upheld use of the regulation "when, as here, the defendant has alleged no prejudice arising from its operation." That requirement is not met here, because the College was prejudiced by application of the regulation. It was not furnished with a copy of Edelman's letter, which was supposedly "amended" by his sworn charge, until the administrative process was complete, and therefore had no opportunity to respond to the charges of discrimination based on religion and national origin while the case was still pending before the EEOC. Nor did it have the benefit of Edelman's detailed explanation of his gender claim until the administrative process was finished. In the Tenth Circuit, this prejudice would prevent application of the EEOC regulation as sought by the petitioner here.[5]

The petitioner also asserts that the Second, Ninth, and District of Columbia Circuits, while they have not ruled directly on application of the regulation in the context at

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[5] The Fifth and Sixth Circuit cases relied on by the petitioner predate the 1972 amendments to Title VII. *Weeks v. Southern Bell*, 408 F.2d 228 (5th Cir. 1969); *Georgia Power Co. v. EEOC*, 412 F.2d 462 (5th Cir 1969); *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355 (6th Cir. 1969). The 1972 amendments transformed the requirement of verification from "prefatory language" (i.e. "[w]henever it is charged in writing under oath by a person claiming to be aggrieved…the Commission shall…") into "a clearly stated statutory prerequisite" (i.e., "charges shall be under oath or affirmation"). *See Vason v. City of Montgomery*, 2001 WL 69245 (11th Cir. 2001) (discussing significance of 1972 amendment to Title VII). Given the "prefatory" nature of the earlier language, it is not surprising that, as the petitioner puts it, "[i]n the years immediately following the enactment of Title VII, the statute itself was universally interpreted" to allow post-limitations verification (Petition at 8). The petitioner fails to mention that this "universal" interpretation was of a different version of the statute.

issue here, have applied it or cited it with approval.[6] However, the decisions in those circuits, like those in the Seventh and the Tenth, merely reinforce the respondent's position that this case is not an appropriate vehicle for resolving the "split" in the circuits.[7] In both *Casavantes v. California State University*, 732 F.2d 1441 (9th Cir. 1987) and *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14 (2nd Cir. 1981), the court took equitable considerations into account, and—unlike this case—those considerations weighed in favor of the claimant. In *Casavantes*, the claimant was acting *pro se*, and the EEOC did not send him the charge until the 300-day limitations period had already elapsed. In *EEOC v. Sears, Roebuck*, the central issue was whether a "de facto" commissioner had authority to verify a charge on behalf of the EEOC. He had done so twelve days after the statutory deadline, and the court noted that there had been no prejudice to the employer. Even accepting the petitioner's contention that these two circuits are favorably disposed to allowing belated verification to "relate back," Edelman would not qualify for this treatment.

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[6] Perhaps in an effort to suggest greater consensus in the circuits than actually exists, the petitioner also asserts that the Eleventh Circuit, unlike the Fourth, has held that an intake questionnaire can qualify as a charge, "if it satisfie[s] the requirements of 29 C.F.R. §1601.12(b)" (Petition at 7, n.7). The petitioner cites *Clark v. Coates and Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989) in support of this statement. In that case, the court held that an intake questionnaire, filed timely, constituted a charge even though the "formal charge" was not executed until after the statutory deadline. However, Clark involved not a Title VII claim but a claim under the Age Discrimination in Employment Act (ADEA), which does not require that charges be sworn. The regulation at issue here was not even mentioned in the case, and would have been irrelevant in any event.

[7] The case cited by the petitioner from the D.C. Circuit, *Simpkins v. Washington Metropolitan Transit Authority*, 1991 WL 702349 (D.C.Cir. 1997), is an unreported case where the regulation is mentioned only in dicta. The court remanded the case for development of facts related to equitable tolling.

In all circuits, courts have been authorized by this Court to take equitable considerations into account in determining the issue of timely filing under Title VII. In *Zipes v. Trans World Airlines, Inc*, 455 U.S. 385 (1982), this Court held that filing a charge of discrimination with the EEOC is not jurisdictional, but instead is a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. These doctrines are employed by the Fourth and the Eighth, as well as the other circuits, to allow claims to proceed where the statutory requirements for charges have not been strictly adhered to, but equitable considerations weigh in favor of allowing the claims to proceed. *See, e.g., Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447 (8th Cir. 1998) (court applied doctrine of equitable tolling where EEOC did not send charge to claimant until several months after the statutory limitations period had run; EEOC also assigned charge number to unverified complaint and notified the employer of the complaint); *Waiters v. Robert Bosch Corp.*, 683 F.2d 89, 92 (4th Cir. 1982) (equitable tolling applied where EEOC error rendered filing untimely); *Lane v. Wal-Mart Stores East*, 69 F.Supp. 2d 749, 754-755 (D.Md. 1999) (pre-*Edelman* court allowed "relation back" under regulation, but also held equitable tolling appropriate where EEOC employee provided incorrect information to *pro se* complainant).

Because equitable tolling and other equitable doctrines are universally available in cases addressing the issue of timely filing, and because courts factor in equitable considerations even when applying the regulation at issue here, the "split" in the circuits does not produce such widely differing results from circuit to circuit as the petitioner implies. Accordingly, no compelling conflict exists in the circuits that requires the immediate intervention of this Court. While the Court may decide in the future to consider whether 29 C.F.R. §1601.12(b) can validly be applied in the

context of post-limitations verification, this case is not the appropriate vehicle for consideration of this issue.[8]

II. Certiorari Is Not Appropriate In Order To Salvage The EEOC's "Longstanding Legal Scheme" Of Processing Complaints.

The petitioner argues that this Court should grant certiorari because the Fourth Circuit's decision "undermines" the EEOC's "longstanding legal scheme" for processing complaints of discrimination (Petition at 10-11). However, the elements of this scheme that the petitioner describes as threatened by the Fourth Circuit's decision have nothing to do with this case. For example, the petitioner is concerned that the EEOC's unsworn intake questionnaires "would probably have to be abandoned." But no intake questionnaire was used in this case (*Id.*. at 10). The petitioner further warns that complainants would be forced into signing affidavits hurriedly, "without any opportunity for a reasoned analysis of the complainant's problem by agency professionals" (*Id.* at 11). Here, Edelman had the benefit not only of "reasoned analysis" of his claims by the EEOC, but also by his two sets of attorneys, well before the deadline for filing. Indeed, none of the "parade of horribles" recited in this portion of the petition has any relevance to Edelman's situation whatsoever.

The petitioner also suggests that EEOC officials may feel obligated to handle complaints differently depending on where they arose (Petition at 11). While this may be true, it was true before the Fourth Circuit's decision as well. Again, should the Court wish to address the issue of verifying a

[8] The Court denied certiorari in *Shempert v. Harwick Chemical Corp.*, 151 F.3d 793 (8th Cir. 1998), *cert. den.* 525 U.S. 1139 (1999), as well as in *Peterson v. City of Wichita*, 888 F.2d 1307 (10th Cir. 1989), *cert. den.* 495 U.S. 932 (1990).

charge after the expiration of the statutory limitations period, it should do so in a case where that issue was determinative of the outcome of the case, rather than in this case, where the issue did not have to be reached.

III. Certiorari Is Not Appropriate To Address Equitable Tolling.

The petitioner also asks the Court to grant certiorari in order to rule that all "complainants, *like petitioner*, who relied upon that regulation to their detriment," are entitled to equitable tolling (emphasis added). The record in this case contains no suggestion that the petitioner relied on this regulation, or any other regulation or representation by the EEOC, when he filed late. Indeed, the record indicates that he did not so rely.[9] Nor, as held by both the district and appeals courts, does his case qualify for equitable tolling on any other basis.

This Court does not grant certiorari for the purpose of rendering advisory opinions. Yet this is what the petitioner would have the Court do on the issue of equitable tolling. The Court should decline this invitation.

[9] Edelman has never claimed ignorance of the applicable statutory deadline—perhaps because such a claim would be impossible to credit, given that he was represented by two attorneys at the time he first contacted the EEOC. Simple negligence is the most likely explanation. While Edelman's attorneys may have miscalculated, that does not create an issue for this Court.

CONCLUSION

For all of the above reasons, the respondent asks that the petition for certiorari be denied.

Respectfully submitted,

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